Proton Parts Centre Sdn Bhd v Mohamed bin Zainal and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-03(IM)-176 OF 2007 AND B-03–177 OF 2007
RAUS SHARIF, SULONG MATJERAIE AND MOHD HISHAMUDIN JJCA
14 SEPTEMBER 2009

Civil Procedure — Amendment — Writ and statement of claim — Whether amended writ and statement of claim sealed or signed by registrar — Whether amendment proper and effective

Civil Procedure — Striking out — Action — Plaintiff's action based on slander — Whether defamatory words uttered or gestures made against plaintiff — Whether plaintiff had cause of action — Whether plaintiff's claim disclosed any reasonable cause of action — Whether plaintiff's action ought to be struck out — Rules of the High Court 1980 O 18 r 19(1)(a)

Tort — Defamation — Slander — Whether mere conduct could give rise to slander

The plaintiff claimed damages against the defendants for an alleged tort of slander. The plaintiff's claim was based on the act of the first defendant in preventing the plaintiff from entering his office and in sealing his office in the full view of the employees working in the premises. The defendants applied under O 18 r 19(1)(a) of the Rules of the High Court 1980 to strike out the plaintiff's claim as disclosing no reasonable cause of action. The senior assistant registrar dismissed their application and their appeals to the judge in chambers were also dismissed. The defendants thus appealed to the Court of Appeal.

Held, allowing the appeals with agreed costs here and below:

(1) The mere act of the first defendant's security officer in preventing the plaintiff from entering the premises of his office and in sealing the premises could not in law amount to the tort of slander. There were no defamatory words uttered by the officer concerned, nor was any gesture

made by him. Therefore, there could not be a cause of action in slander. The mere conduct — as opposed to words and gestures — of a person could not amount to slander (see para 12).

(2) There was no basis for making the second and third defendants parties to the proceedings. Further, the third defendant had been wrongly cited in the writ and statement of claim and there had been no proper and legally effective amendment to the writ and statement of claim at all. At the date of hearing of the appeal, the amended writ and statement of claim had yet to be sealed and signed by the High Court registrar (see paras 16–17).

[Bahasa Malaysia summary

Plaintif menuntut ganti rugi terhadap defendan untuk dakwaan tort fitnah lisan. Tuntutan plaintif adalah berdasarkan tindakan defendan pertama menghalang plaintif daripada memasuki pejabatnya, dan menyita pejabatnya di hadapan pekerja-pekerja yang bekerja di premis tersebut. Defendan-defendan memohon di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membatalkan tuntutan plaintif kerana tidak mengemukakan kausa tindakan yang munasabah. Penolong kanan pendaftar menolak permohonan mereka dan rayuan mereka kepada hakim dalam kamar juga ditolak. Defendan-defendan oleh itu merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan dengan kos dipersetujui di mahkamah ini dan Mahkamah Tinggi:

(1) Tindakan pegawai keselamatan defendan pertama yang semata-mata menghalang plaintif daripada memasuki premis pejabatnya dan menyita premis tersebut, dari segi undang-undang bukanlah tort fitnah lisan. Tidak terdapat kata-kata fitnah yang diungkapkan oleh pegawai berkenaan, dan juga tidak terdapat apa-apa gerak isyarat yang dibuat olehnya. Oleh itu, tidak terdapat kausa tindakan dalam fitnah lisan. Tindakan semata-mata — dan bukannya kata-kata dan gerak isyarat — daripada seseorang bukanlah merupakan fitnah lisan (lihat perenggan 12).

(2) Tidak ada asas untuk menjadikan defendan kedua dan ketiga pihak kepada prosiding tersebut. Selanjutnya, defendan ketiga telah salah dirujuk di dalam writ dan pernyataan tuntutan dan tiada langsung pindaan efektif yang betul dan sah terhadap writ dan pernyataan tuntutan tersebut. Pada tarikh pendengaran rayuan, writ dan

pernyataan tuntutan yang dipinda belum lagi dimeterai dan ditandatangani oleh pendaftar Mahkamah Tinggi (lihat perenggan 16–17).]

Notes

For cases on action, see 2(2) *Mallal's Digest* (4th Edition, 2007 Reissue) paras 6655–6693.

For cases on slander, see 12 *Mallal's Digest* (4th Edition, 2008 Reissue) paras 525–535.

For cases on writ and statement of claim, see 2(2) *Mallal's Digest* (4th Edition, 2007 Reissue) paras 593–596.

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(a)

Appeal from: Civil Suit No MT1–22–502 of 2003 (High Court, Shah Alam)

Justin Voon (Hee Seong Wing with him) (Sidek Teoh Wong & Dennis) for the appellants.

Walter Pereira (Balbir Singh with him) (Kamarudin & Partners) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] These two appeals, namely, B-03–176 of 2007 and B-03–177 of 2007 are related and heard together before us. They originated from the High Court of Shah Alam Civil Suit No MT1–22–502 of 2003.

[2] At the High Court, the plaintiff's writ action against the defendants was for a claim for damages for an alleged tort of slander. The defendants applied before the senior assistant registrar under O 18 r 19(1)(a) of the Rules of the High Court 1980 to strike out the plaintiff's claim as disclosing no reasonable cause of action. Their applications were dismissed with costs.

[3] They appealed to the judge in chambers. But their appeals were dismissed with costs by the learned judicial commissioner.

[4] They now appeal to this court.

[5] We have allowed the appeal with costs. We now give our reasons.

[6] In our judgment, on the facts, we accept the submission of the defendants (the appellants before us) that the plaintiff (the respondent before us) has no cause of action in slander against them.

[7] The plaintiff was the managing director of the first defendant company. The second defendant is the chairman of the board of directors of the first defendant and the chief executive officer of the third defendant. The third defendant is a public listed company and is the majority shareholder of the first defendant.

[8] We have carefully examined the statement of claim. In order to appreciate the averred facts and the cause of action we need only to consider paras 7–12 of the statement of claim. They read:

7. On 4/2/2003, the plaintiff went to work as normal at 7.55 a.m but the plaintiff was prevented by the Chief Security from entering into the office premises and was informed that his office had been sealed. There was no notice of any nature given to the plaintiff neither prior to this incident nor on that date. The plaintiff has an unblemished work record also never been reprimanded or warned of any wrongdoing in his entire career with the 1st and 3rd defendants.

8. The act of preventing the plaintiff from entering into the office premises and the sealing of his office was done in full view and or knowledge of the employees working at the premises.

9. At 8.58 a.m on 4/2/2003, the plaintiff immediately faxed a letter to the 2nd defendant who is also the Chairman of the Board of Directors of the 1st defendant to seek an explanation.

10. As of 9.00 a.m the next day, 5th February 2003, the plaintiff still was not given any explanation to his being prevented from entering his office. The plaintiff sent another fax to the 1st defendant wherein he considered himself constructively dismissed.

11. On Wednesday, 5th February 2003, the plaintiff received a letter from the 1st defendant dated 4th February 2003 in reply to his memo / fax of 4th February 2003 stating that the board of the 1st defendant had on 29th January 2003 decided that the plaintiff was to go on leave with full pay pending completion of the investigation of various alleged irregularities in the management of the company.

12. Despite the board's decision of 29/1/2003 there was no communication and or attempt to communicate to our client of the board's decision on 29/1/2003 until 4.30 p.m of Tuesday 4/2/2003. The plaintiff was not present nor informed of the meeting of the board on 29/1/2003.

[9] For the purpose of this judgment, we will assume that the facts as averred in the above paragraphs are true.

[10] Learned counsel for the plaintiff, Encik Walter Pereira, submits that the cause of action against the defendants is based on the act of the first defendant in preventing the plaintiff from entering his office, and in sealing his office in the full view of the employees working in the premises.

[11] In urging us to rule that the conduct of the first defendant in sealing preventing the plaintiff from entering his office amounts to slander, learned counsel referred us to a textbook entitled *Defamation Law, Procedure & Practice* (2nd Ed) by David Price wherein the learned author states (at p 35):

> Defamatory matter communicated by word of mouth is slander except, arguably, when the speaker is reciting from a document. Defamatory gestures and conduct are slanders. Occasional claims are brought where the claimant has been physically removed or escorted from the defendant's premises, for example, on the summary termination of employment. It is suggested that the conduct of the defendant or his agents conveys the impression to bystanders that the claimant has been guilty of improper behaviour.

[12] With respect we are unable to accept the above submission. We are of the view that the mere act of the security officer of the first defendant in preventing the plaintiff from entering the premises of his office and in sealing the premises cannot in law amount to tort of slander. There were no defamatory words uttered by the officer concerned, nor any gesture made by him. Therefore, there cannot be a cause of action in slander. We are unable to agree with the contention that the conduct (as opposed to words and gestures) of a person may amount to slander.

[13] We have referred to two classic works on the law of tort. However, it appears to us that none supports the proposition as advanced by learned counsel for the plaintiff with regard to conduct. According to *Clerk & Lindsell on Torts* (17th Ed) at p 1026, paras 21–28:

> Slander distinguished from libel. Slander is defamation communicated in some non-permanent form by spoken words, or other sounds, or by gestures.

[14] And *Winfield & Jolowicz on Tort* says (14th Ed) at pp 314–315:

> Liablity for defamation is divided into two categories of libel and slander, and this division has important consequences. A libel consists of defamatory statement or representation in permanent form; if a defamatory meaning is conveyed by spoken words or gestures it is slander.

[15] The above two authorities above appear to suggest that the tort of slander is confined to words and gestures only. It does not extend to conduct.

[16] With regards to the second and third defendants, having examined the pleadings, we find that there is no basis at all for making them parties to the proceedings.

[17] As for the third defendant, there is yet another reason why the action against them ought to be struck out. They have not been properly cited in the writ and statement of claim. The registered name of the third defendant, as a company, is 'Perusahaan Otomobil Nasional Bhd'. But they have been wrongly cited in the writ and statement of claim as 'Proton Berhad'. The plaintiff maintains that he has amended the writ and statement of claim so as to correct the misnomer. However, the truth is that there has been no proper and legally effective amendment at all. Till the date of the hearing of this appeal (and this is conceded by plaintiff's counsel himself), the amended writ and statement of claim filed are not even sealed and signed by the registrar of the High Court (see pp 322 and 326 of the appeal record).

[18] Accordingly, we are unanimous that this appeal be allowed with an agreed costs of RM10,000 incurred here and below to be borne by the plaintiff. Deposit to be returned to the defendant.

Appeal allowed with agreed costs here and below.

Reported by Andrew Christopher Simon